Supreme Court, U.S.
F I L E D
MAR 5 1992
OFFICE OF THE CLERK

No. 91-1270

In The

Supreme Court of the United States

October Term, 1991

ANN RICHARDS, Governor of Texas, *et al.*,

Appellants,

v.

LOUIS TERRAZAS, *et al.*,

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

APPELLEES' MOTION TO AFFIRM

OF COUNSEL:

JONATHAN D. PAUERSTEIN
KEVIN M. WARBURTON
McCAMISH, MARTIN
& LOEFFLER
A Professional Corporation

JOHN N. McCAMISH, Jr.
Counsel of Record
McCAMISH, MARTIN
& LOEFFLER
A Professional Corporation
175 East Houston
Suite 1200
Post Office Box 2999
San Antonio, Texas
78299-2999
Telephone: (512) 225-5500

March 1992

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR AFFIRMING THE JUDGMENTS 8

A. THE QUESTIONS PRESENTED BY APPELLANTS ARE INSUBSTANTIAL 9

1. The Lower Court Was Not Acting Under Section 5 And Did Not Supplant A Precleared Plan 9

2. Preclearance Does Not Bar Section 2 Review 14

B. THE DECISIONS BELOW ARE CORRECT 16

1. The Population Deviation Under The Interim Senate Plan Was Proper 17

2. The Interim Senate Plan Improves Minority Voting Rights In Comparison To The Quiroz Plan 20

CONCLUSION 22

APPENDICES

A. Application for Preliminary Injunction, November 27, 1991 ..... A-1

B. Letter of John R. Dunne, Assistant Attorney General, January 4, 1992 ..... B-1

C. Memorandum Order, *Texas v. United States*, February 25, 1992 ..... C-1

TABLE OF AUTHORITIES

Page

CASES

City of Rome v. United States, 446 U.S. 156 (1980) 14

Connor v. Finch, 431 U.S. 407 (1977) 17

Dougherty County, Georgia, Board of Education v. White, 439 U.S. 32 (1978) 13

Fusari v. Steinberg, 419 U.S. 379 (1975) 18

Mahan v. Howell, 410 U.S. 315 (1973) 10, 17, 21

Major v. Treen, 574 F. Supp. 325 (E.D. La. 1983) 14

Mandel v. Bradley, 432 U.S. 173 (1977) 18

McGhee v. Granville County, 860 F.2d 110 (4th Cir. 1988) 10

Mississippi v. Smith, 541 F. Supp. 1329 (D.D.C. 1982), *appeal dismissed*, 461 U.S. 912 (1983) 11

Morris v. Gressette, 432 U.S. 491 (1977) 14

NAACP v. Hampton County Election Commission, 470 U.S. 166 (1985) 13

Perkins v. Matthews, 400 U.S. 379 (1971) 12

Presley v. Etowah County Commission, ___ U.S. ___, 60 U.S.L.W. 4135 (Jan. 27, 1992) 13

Reynolds v. Sims, 377 U.S. 533 (1964) 10

Richards v. Terrazas, ___ U.S. ___, 112 S.Ct. 924 (1992) 7, 20

South Carolina v. Katzenbach, 383 U.S. 301 (1966) .. 14, 15

Terrazas v. Ramirez, ___ S.W.2d ___, 35 Tex. Sup. Ct. J. 256 (Dec. 17, 1991) 4

TABLE OF AUTHORITIES – Continued

Page

United Jewish Organizations v. Carey, 430 U.S. 144 (1977) 14

United States v. East Baton Rouge Parish School Board, 594 F.2d 56 (5th Cir. 1979) 14

United States v. Sheffield Board of Commissioners, 435 U.S. 110 (1978) 12

Watkins v. Mabus, 771 F. Supp. 789 (S.D. Miss. 1991), *aff'd in part and vacated in part*, ___ U.S. ___, 112 S.Ct. 412 (1992) 17

Wise v. Lipscomb, 437 U.S. 535 (1978) 10, 21

CONSTITUTIONS

U.S. CONST. amend. XIV 2, 10

U.S. CONST. amend. XV 2, 10

TEX. CONST. art. 3, §39 6

STATUTES

42 U.S.C. §1973 .....2, 13-16

42 U.S.C. §1973c 2, 9-15, 22

TEX. ELEC. CODE ANN. §172.023(a) (Vernon Supp. 1992) 4

ADMINISTRATIVE REGULATIONS

28 C.F.R. §51.52 – 59 12

28 C.F.R. §51.54(b) 11

RULES

Sup. Ct. R. 14.1(a) 16

Sup. Ct. R. 18.3 16

Sup. Ct. R. 18.6 1

No. 91-1270

In The

Supreme Court of the United States

October Term, 1991

ANN RICHARDS, Governor of Texas, *et al.*,

Appellants,

v.

LOUIS TERRAZAS, *et al.*,

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

APPELLEES' MOTION TO AFFIRM

Louis Terrazas, Ernest Angelo, Jr., Tom Craddick, Robert A. Estrada, and Sim D. Stokes, III ("Appellees"), respectfully move to affirm the judgments of the United States District Court for the Western District of Texas in this case. Sup. Ct. R. 18.6. The reasons for affirming the district court's judgments appear below.

STATEMENT OF THE CASE

As in past decades, the attempt by the State of Texas to redistrict its legislature following the release of the 1990 decennial census has been chaotic. Legislative redistricting plans for the Texas House of Representatives and

Texas Senate were enacted in June 1991, but the state did not submit them to the Department of Justice for preclearance under section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973c ("section 5") until August. After enactment, the state's plans were attacked by Appellees in the court below under section 2 of the Voting Rights Act, 42 U.S.C. §1973 ("section 2") and the Fourteenth and Fifteenth Amendments to the United States Constitution and by certain minority groups in Texas state court on state law grounds. The state court litigation over the legislature's senate plan ended in October 1991, when the initial legislative plan was cast aside in favor of a plan agreed upon by the state and minority group lawyers (the "*Quiroz* Plan"), which was approved by a state district judge.

The legislature's plan for the Texas House fared no better. In November, the Justice Department refused to preclear the house plan, leaving Texas with no plan for redistricting the Texas House. Appellees therefore requested the court below to implement an interim house plan. A hearing on this request was scheduled for the week of December 9, 1991.

After agreeing to the *Quiroz* Plan, the state withdrew the legislature's senate plan from preclearance consideration and replaced it with the *Quiroz* Plan. To prevent implementation of an agreed plan invalid under both state and federal law, Appellees sought a writ of mandamus from the Texas Supreme Court and injunctive relief from the three-judge panel below. Following preclearance of the *Quiroz* Plan by the Justice Department in November 1991, Appellees asked the court below to enjoin implementation of the illegal state court plan and to exercise its equitable power to adopt an interim senate redistricting plan. *See* Appendix A. Appellees requested "an injunction against the conduct of elections

under the illegal [*Quiroz*] redistricting plan . . . [,] an order implementing [Appellees'] senate plan on an interim basis [,] and an order scheduling hearing on the first two matters on December 10, 1991." *Id.* at A-2. The lower court scheduled hearings on all of Appellees' requests for interim relief for December 10.

On December 10, the Texas Supreme Court heard Appellees' petition for writ of mandamus to compel the vacatur of the *Quiroz* Plan. That morning, the state supreme court took Appellees' petition under consideration, and Appellees carried their attack on the *Quiroz* Plan and the state's other plans to the federal court for trial on their request for preliminary injunction.

Trial before the lower court lasted four days. Over three hundred exhibits, including maps, compilations of statistical data, and population studies, were admitted. Twenty-five witnesses testified on behalf of the parties and *amici*, who included Appellees, Appellants Ann Richards, Dan Morales, and John Hannah (collectively, "the state"), several state senators, the commissioners' courts of the three largest counties in Texas, and the Department of Justice. A major issue during the trial was the imminence of the Texas primary elections, which have long been scheduled for "Super Tuesday" – March 10, 1992. Secretary of State John Hannah, Texas' chief election officer, testified that January 10, 1992, was the "drop dead" date for candidate filing in order to allow preparation for a March 10 primary election. Statement of Facts, Hearing on Plaintiffs' Request for Preliminary Injunction and Implementation of Interim Plan, December 11, 1991, at 94. Secretary Hannah also testified that postponing the primary election could cost the state ten to fifteen million dollars, confuse voters, reduce voter

turnout (especially among minority voters), and void voter registration certificates. Appendix to Jurisdictional Statement for Appellants ("State's Appendix") at 11a-12a. He also testified that extending the deadline beyond January 10 would delay the January 13 ballot certification deadline and the January 24 absentee ballot mailing. *Id.* At the conclusion of the trial on December 13, the lower court took Appellees' requests for preliminary injunctions under advisement.

On December 17, 1991, the Texas Supreme Court ordered the agreed judgment adopting the *Quiroz* Plan vacated. *Terrazas v. Ramirez*, ___ S.W.2d ___, 35 Tex. Sup. Ct. J. 256 (Dec. 17, 1991). Governor Richards then issued a call for a special session of the legislature, but that session was not to begin until January 2, which was the statutory deadline for candidate filing. TEX. ELEC. CODE ANN. §172.023(a) (Vernon Supp. 1992). Less than two weeks before the close of the candidate qualification period, the state thus was left with no legally fashioned or precleared redistricting plan for either the senate or the house.

Faced with this situation, which largely was the by-product of the state's own ill-chosen actions, the three-judge panel issued interim orders on December 24, 1991. Those orders created new plans for the house and senate to remedy the discrimination caused by the illegal plans. The court "sought diligently, where appropriate, to adhere to the legitimate districting intent of the state legislature and, where federal constitutional and statutory prohibitions are not offended, to give effect to the will of that body." State's Appendix at 48a. The court could not, of course, give effect to unlawful expressions

of legislative will, but it did not create plans out of whole cloth. Instead, it modified the legislative plans in order to cure the illegalities, strove to place counties in the districts they would have been in under the legislature's lines, and "made every attempt to preserve the legislature's will in those areas of the state where no violations of the Voting Rights Act were found to occur." *Id.* at 43a. The decision was meant to "provide for a valid and equitable interim state legislative redistricting plan in the current circumstances in which no valid plan exists under federal law, and . . . to provide for the holding of elections in Texas without delay and in accordance with state law." *Id.* at 47a. Other factors compelling the creation of interim plans were the need to protect minority voting rights threatened by the state's delay (measurable in months) in submitting its plans to the Justice Department, and the legislature's demonstrable deference to partisan concerns and incumbent protection. *Id.* at 48a.

The determination that the prior legislative plans and the *Quiroz* Plan diluted minority voting rights was unanimous. The Honorable Will Garwood, United States Circuit Judge for the Fifth Circuit Court of Appeals, dissented in part, but only as to the timing of the relief granted. Rather than granting immediate relief, Judge Garwood would have deferred to the then-upcoming special session and waited to see whether the state was able to adopt and obtain preclearance of new plans by January 17. If the state proved able to do so, Judge Garwood believed the court's interim plans should be withdrawn. *Id.* at 51a.

Ten days after the issuance of the court's interim plans, the Texas Legislature met in special session. That

session yielded plans for both the house and the senate. The legislation pertaining to the house left the court-ordered plan in effect for the 1992 electoral round. In the case of the senate, however, the legislature simply adopted the *Quiroz* Plan that had been invalidated by the Texas Supreme Court. Neither plan received a two-thirds vote in both houses, and the statutes therefore are not effective until the middle of April 1992, ninety days after passage. TEX. CONST. art. 3, §39.

As soon as the governor signed them, the new house and senate plans were submitted to the Department of Justice for preclearance review. As of the date of this motion, the department has not announced its decision.

The state twice asked the lower court to stay its order, once before the special session and once afterwards. On January 10, 1992, the three-judge court denied both of these motions, noting that the Justice Department had notified the state that its prior preclearance of the senate plan fashioned in the now-vacated stated court judgment did not obviate the need for preclearance of the newly enacted plan. State's Appendix at 10a. Since the new legislative plans had not been precleared by the Department of Justice – a fact still true today – the court found that its plans offered the only practicable and legal redistricting plan for the March primary. *Id.* at 12a-13a.

After this ruling, the state filed the instant appeal. Apparently because the legislature was content with the lower court's plan for the house, the state does not attack it in this Court. However, it claims that the senate plan suffers from various infirmities.

After it filed its appeal, the state requested an emergency stay of the March 10 primary. On January 16, 1992, this Court denied the stay request. *Richards v. Terrazas*, ___ U.S. ___, 112 S.Ct. ___ (1992). On February 13, the state filed a second motion for emergency stay, which the Court denied on February 15. Finally, last week, on February 24, the Court denied the state's motion to expedite consideration of its jurisdictional statement and grant summary reversal of the lower court before Appellees' could respond.

Appellees' ability to respond to the state's jurisdictional statement is valuable because it affords them the opportunity to correct the state's numerous factual inaccuracies. These errors, and the state's careful omission and arrangement of facts, cloud both the problems the lower court confronted and the solution it reached.

First, the lower court did not implement its interim senate redistricting plan until after the Texas Supreme Court had vacated the *Quiroz* Plan. Both of these judicial acts preceded the enactment of a second legislative plan in the January special session. The new statute, Senate Bill 1 ("SB1"), did not exist when the lower court acted. The state's implication that SB1 was admitted into evidence at the preliminary injunction hearing in December is incorrect. *See* Jurisdictional Statement at 3 n.2.

Second, the state wrongly claims that SB1 has been precleared by the Department of Justice. *See, e.g.*, Jurisdictional Statement at 7 (referring to SB1 as "the precleared, legislatively-enacted Senate plan."). This claim, which is repeated throughout the state's argument, rests on its belief that SB1 need not be precleared because its lines

mirror those in the *Quiroz* Plan. The Department of Justice has informed the state that any legislative redistricting plan, even one identical to the *Quiroz* Plan, must receive preclearance before implementation. *See* Letter of John R. Dunne, Assistant Attorney General, Appendix B. Moreover, the United States District Court for the District of Columbia denied a motion by the state seeking a summary judgment holding that SB1 has been precleared. Memorandum Order, Feb. 25, 1992, *State of Texas v. United States*, Civil Action No. 91-2383 (PMW [USCA], SS, JHG), in the United States District Court for the District of Columbia, Appendix C.

To lend an aura of legitimacy to its arguments, the state declines to disclose these facts. The state can portray its attempts at incumbent protection as concerns for federalism only if it ignores the facts and its own failures. Its attack upon the judgment below is premised entirely upon the contention that SB1 was valid and enforceable under state and federal law, but the lower court nonetheless cast it aside. Lacking both preclearance and a legally expedited effective date, the statute fails on both counts. Due to these failures, the district court was forced to adopt an interim plan for the Texas Senate. This action was necessary and proper, and the state points to nothing that justifies reversal of the ruling below.

REASONS FOR AFFIRMING THE JUDGMENTS

The court below correctly exercised its equitable jurisdiction to create and implement an interim senate plan that both preserved the existing primary schedule

and improved minority voting rights. The state raises no question that would justify a reversal of the lower court's rulings. Because the Jurisdictional Statement fails to justify reversal of the judgments below, and because the lower court acted within its discretion under the facts, the judgments below should be affirmed.

A THE QUESTIONS PRESENTED BY APPELLANTS ARE INSUBSTANTIAL.

The state has raised only two questions concerning the interim plan issued by the lower court. These questions challenge only the lower court's power to grant interim relief. Aside from a brief reference to the population deviation of the interim plan, discussed *infra*, the state does not contend that the remedy is flawed. Instead, it claims the three-judge court did not have the power to act as it did. These claims are insubstantial.

1. The Lower Court Was Not Acting Under Section 5 And Did Not Supplant A Precleared Plan.

The state's first question is two-fold: whether "a local three-judge federal court [a] acting under section 5 of the Voting Rights Act [b] [can] substitute a court-crafted redistricting plan for a legislatively approved plan that obtained section 5 preclearance . . . " Jurisdictional Statement at i. It is able to engineer a negative answer only because it mischaracterizes both the source of the lower court's power and the status of Texas' redistricting law at the time it acted.

First, the three-judge court was not "acting under section 5 of the Voting Rights Act . . . " Instead, it was reviewing Appellees' challenge to the *Quiroz* Plan contained in the preliminary injunction application filed on November 27, 1991. In that application, Appellees left little doubt as to the basis for this challenge:

> Plaintiffs are likely to succeed on their claims that the districts created by the Quiroz Plan violate the protections afforded to racial and language minorities by the Voting Rights Act and the one person/one vote guarantees of the Fourteenth and Fifteenth Amendments of the Constitution.

Appendix A at 6. When the lower court issued its decision, it acted upon this application. Moreover, Texas then lacked senate and house plans based on the 1990 census: the senate plan had been voided by the Texas Supreme Court, and the house plan had been denied preclearance by the Justice Department. Thus, when the court considered whether Appellees' request for implementation of interim plans should be granted, it had to fill a void created by the state's failure to adopt lawful plans and the admitted unconstitutionality of the lines drawn after the 1980 census. To allow the elections to proceed on schedule, the court exercised its power to fashion interim relief, a power this Court often has recognized. *See, e.g., Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *Mahan v. Howell*, 410 U.S. 315, 332 (1973); *Reynolds v. Sims*, 377 U.S. 533, 587 (1964); *see also McGhee v. Granville County*, 860 F.2d 110, 115 (4th Cir. 1988).

Second, the lower court did not supplant a precleared legislative plan with its interim senate plan. The state's

contention that SB1 was a precleared senate plan on December 24 (when the interim plan issued) is both legally and factually incorrect. The legislature did not enact SB1 until two weeks after the December 24 order was issued. Moreover, even after it was passed it was ineffective under state law. *See supra* at 6. When the lower court acted, the statute did not exist; today, it remains ineffective under federal and state law. The lower court cannot be said to have supplanted a non-existent law.

Third, the state's claim that SB1 is a precleared plan is erroneous. This argument rests on the claim that SB1 is identical to the *Quiroz* Plan adopted by the state court, which was precleared in November. The state's position contradicts its prior actions: not only did it submit SB1 to the Department of Justice for preclearance, it also sought summary judgment preclearing SB1. *See* State of Texas's Motion for Partial Summary Judgment, filed in *State of Texas v. United States of America*, Civil Action No. 91-2383 (PMW [USCA], SS, MB), Feb. 5, 1992. More importantly, this argument misinterprets the effect of the issuance of the interim senate plan and the scope of section 5 of the Voting Rights Act.

When SB1 was passed, Texas' senate districts were determined by the lower court's interim plan. As a result, the court's plan serves as a benchmark against which to compare SB1 to ascertain whether the latter constitutes a retrogression in minority voting strength. *See Mississippi v. Smith*, 541 F. Supp. 1329, 1333 (D.D.C. 1982), *appeal dismissed*, 461 U.S. 912 (1983); *see also* 28 C.F.R. § 51.54(b). Further, even if the *Quiroz* Plan were considered to be the benchmark for comparison of SB1, the legislative plan could not be considered precleared. SB1 cannot escape

preclearance review merely because it logically cannot make minorities worse off than the *Quiroz* Plan – retrogression is only one aspect of a section 5 review. 28 C.F.R. § 51.52-59. The three-judge panel in the District of Columbia aptly explained why the November 1991 preclearance of the *Quiroz* Plan does not insulate SB1 from section 5 review:

> [E]ven if the *Quiroz/Mena* settlement plan were deemed to be the proper benchmark, SB1 would still be subject to preclearance. While the retrogression analysis would be simple inasmuch as SB1 and the *Quiroz/Mena* settlement plan are substantively identical, the analysis of whether SB1's purpose was discriminatory cannot be resolved simply by recognizing that the *Quiroz/Mena* settlement plan had been precleared.

See Appendix C at 9.

Thus, the argument that SB1 is a precleared plan has been rejected by the two authorities charged with enforcing section 5. The determination by the Department of Justice that SB1 is not now enforceable under the Voting Rights Act, *see* Appendix B, is particularly significant because "administrative construction of the Act is persuasive evidence of the original understanding, especially in light of the extensive role the Attorney General played in drafting the statute and explaining its operation to Congress." *United States v. Sheffield Board of Commissioners*, 435 U.S. 110, 131 (1978); *see also Perkins v. Matthews*, 400 U.S. 379, 391 (1971). If the Attorney General does not inform the submitting authority that a submitted change need

not be precleared, this Court can infer that preclearance is required. *See NAACP v. Hampton County Election Commission*, 470 U.S. 166, 179 (1985). *A fortiori*, when the Attorney General informs the submitting authority that preclearance is required, deference to that direct interpretation is warranted. *See Dougherty County, Georgia, Board of Education v. White*, 439 U.S. 32, 39 (1978).

The state's premises – that the lower court acted under section 5 and supplanted a precleared legislative plan – are wrong. The court below acted upon appellees' challenge to the absence of any redistricting plan that satisfied the standards of section 2 and the United States Constitution. Its action was within its power, and the state's effort to miscast the inquiry cannot alter that fact.

Similarly, the state's citation to this Court's recent opinion in *Presley v. Etowah County Commission*, ___ U.S. ___, 60 U.S.L.W. 4135 (Jan. 27, 1992), is misleading. *Presley* holds that the internal allocation of political power among elected officials is not covered by section 5; it does not stand to reason that the legislative enactment through legal means of a redistricting plan originally proposed through illegal ones is outside the scope of preclearance. More to the point, *Presley* does not apply here, where the lower court acted under section 2 to provide a remedy for the absence of any legally valid redistricting plan. The state's revisionist portrayal of the lower court as a section 5 tribunal, and consequently one of limited jurisdiction, is wrong and should be rejected.

2. Preclearance Does Not Bar Section 2 Review.

As its second question, the state asks whether preclearance establishes "prima facie validity" of a redistricting plan and thus precludes interim relief under section 2 of the Voting Rights Act. Jurisdictional Statement at i. The answer is plain – it does not.

Section 5 of the Voting Rights Act was "designed by Congress to banish the blight of racial discrimination in voting . . . . " *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). It conditions enforcement of voting changes by specified political subdivisions upon satisfactory review by the federal administration or judiciary. *United Jewish Organizations v. Carey*, 430 U.S. 144, 157 (1977). The statute expressly states that preclearance of a change does not "bar a subsequent action to enjoin enforcement of such [change]." 42 U.S.C. §1973c. Because of this language, courts have held that preclearance prevents neither a section 2 challenge by private plaintiffs, *Major v. Treen*, 574 F. Supp. 325, 327 n.1 (E.D. La. 1983), nor a subsequent enforcement action by the Department of Justice. *United States v. East Baton Rouge Parish School Board*, 594 F.2d 56, 59 n.1 (5th Cir. 1979); *see also Morris v. Gressette*, 432 U.S. 491, 507 (1977). Given the different standards of proof under section 2 and section 5, preclearance creates no favorable presumption for the submitting jurisdiction: in fact, the legislative purpose behind preclearance is to require certain jurisdictions to overcome the historical presumption that their voting changes may attempt or result in discrimination against minority voters. *See City of Rome v. United States*, 446 U.S. 156, 182 (1980).

Moreover, the state's argument would deprive minority voters of the benefits of section 2 in states covered by section 5. Preclearance is required primarily in those states where racial and ethnic discrimination is an historical fact. Because of their past practices, these states must convince the Department of Justice that a proposed change apparently is not another episode in a history of discrimination. If the state succeeds, private litigants are free to attack the change in an adversary proceeding. Accepting the state's argument that SB1 deserves "the most stringent application of the concept of prima facie validity," Jurisdictional Statement at 16, would place upon the victims of discrimination the burden section 2 was designed to lift. *South Carolina v. Katzenbach,* 383 U. S. at 328 (intent behind section 5 was to remedy the shifting of "the advantage of time and inertia from the perpetrators of the evil to its victims"). Thus, even if SB1 had existed on December 24, was effective under state law, and had been precleared by the Justice Department, preclearance would not have shielded it from section 2 scrutiny.

In any case, the state's argument fails because it is based on the flawed assumption that SB1 was precleared before the lower court adopted its interim plan. In fact, SB1 was not enacted until after the court-ordered interim plans were adopted and it never has been precleared. The court below never was required to consider whether to defer to a precleared legislative plan. Any contention that section 5 preclearance creates a presumption of section 2 validity therefore is irrelevant. The state's claim that SB1 has been precleared and is entitled to a presumption of validity, like its claim that the court's interim senate plan

displaced SB1, simply ignores the facts and the law. The state's complaints concerning the lower court's determination that SB1 violates section 2 also are without merit. This finding was made when the court denied the state's motion seeking a stay of the interim senate plan pending preclearance of SB1 and a trial on its legality.

In sum, the only two questions raised by the state as grounds for summary reversal of the interim senate plan assume that SB1 was a valid and enforceable precleared plan between December 24, 1991, and January 10, 1992. The state's arguments stand or fall according to the degree to which the court was required to defer to such a plan. However, a precleared SB1 is a figment of the state's manipulation of the facts. During trial, the *Quiroz* Plan – like Appellees' proposed senate plan – was merely an option offered to the court in fashioning interim relief; SB1 did not exist at all. The court chose to reject the *Quiroz* Plan that became SB1; it rejected Appellees' proposal as well. After passage, SB1 became simply an unprecleared plan yet to be effective under state law. On January 10, there was nothing to which to defer. The lower court's failure to defer to nothing is not error.

B. THE DECISIONS BELOW ARE CORRECT.

The state restricts its grounds for summary reversal to issues dependent upon the alleged preclearance of SB1. It therefore has limited itself to these issues on appeal. Sup. Ct. R. 14.1(a), 18.3. Appellees' motion to affirm, however, is not limited only to rejection of these issues, Sup. Ct. R. 18.6, and Appellees assert that lower court's judgment should be affirmed for the reasons set forth below.

1. The Population Deviation Under The Interim Senate Plan Was Proper.

The Jurisdictional Statement implies that the lower court erred by crafting an interim plan that contained a 9.98% population deviation. This complaint ignores the fact that the plan is an interim plan, and thus is held to a less stringent standard than is applied to final court-ordered plans. *Compare Connor v. Finch*, 431 U.S. 407, 418 (1977) (deviation of over 16% not *de minimis* in final plan) *with Mahan v. Howell*, 410 U.S. 315, 332 (1973) (deviation of 10% permissible in interim plan). Only four months ago, this Court affirmed an interim redistricting plan whose population deviation was eleven times greater than that found in the lower court's senate plan. *Watkins v. Mabus*, 771 F. Supp. 789 (S.D. Miss. 1991). *aff'd in part and vacated in part*, ___ U.S. ___, 112 S. Ct. 412 (1992). In *Watkins*, the court was left with less time to create a remedy than was available to the lower court in the case at bar; accordingly, rather than craft its own plan, the court ordered on an interim basis the continued use of the 1982 lines. 771 F. Supp. at 807. Although the court recognized that the maximum population deviation between districts in the 1982 plan – over 110% – exceeded the benchmarks for both court-ordered and legislative plans, it determined that its "concerns about the otherwise unacceptable population deviations in certain districts under the 1982 plan are far outweighed by the benefits to the voters in these elections." *Id.* at 804. Reaffirming that "[e]lections are for the voters," the court explained its decision:

> Although the deviation levels using existing districts would certainly be unconstitutional if

> this court were adopting a permanent reapportionment plan, we hold that elections may be constitutionally held using current districts *on an interim basis*. . . . We conclude . . . that the priority of holding elections on a timely basis warrants a temporary departure from the one-person, one-vote principle, pending adoption of a permanent reapportionment plan by either the Legislature or this court.

Id. (emphasis in original). While the summary affirmance of this portion of the decision does not define this Court's opinion, *Fusari v. Steinberg*, 419 U.S. 379, 391-392 n. (1975) (Burger, C.J., concurring), it does indicate the application of established principles. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

The state also ignores the focus and effect of the underpopulation in the interim plan. During the trial that resulted in the interim plan, the state introduced the testimony of an attorney who represented the plaintiffs in the *Quiroz* settlement who defended the underpopulation of minority districts created in the *Quiroz* Plan:

> If you draw districts that are precisely equal in population pursuant to the unadjusted census count, then those districts are actually overpopulated and packed with minority population. We felt that it was essential, therefore, that minority districts be drawn below ideal population. . . .

Statement of Facts, Hearing on Plaintiffs' Request for Preliminary Injunction and Implementation of Interim Plan, December 13, 1991, at 229-230. The lower court plainly showed concern over the alleged minority undercount. In its interim senate plan, most of the minority

districts are underpopulated to accommodate for the undercount: seven of the plan's ten districts in which minorities constitute the population majority are underpopulated by an average of 8,948 persons. Two of the other three districts are of ideal district size: only District 19 is overpopulated (by 234 persons, a .00043 deviation). Overall, the plan's average underpopulation of the ten minority districts is 6,264, while the average overpopulation of Anglo majority districts is 4,288.

The lower court's effort to protect minority voting rights contrasts sharply with the state's dilatory and self-interested practices. It was only because of the excessive delay in submitting the first legislative senate plan to the Department of Justice that the so-called emergency necessitating the *Quiroz* settlement arose. In turn, the illegal formulation of that plan led to its vacatur by the Texas Supreme Court two weeks before the candidate filing deadline. Finally, egregious catering to incumbent Anglo Democrats during the January 1992 special session forced the lower court to issue its January 10 opinion rejecting SB1 as a replacement for the court's interim plan. the delays and gamesmanship that have characterized the state's handling of redistricting have not gone unnoticed. As the Department of Justice wrote in opposing the state's "last minute" effort to stay the lower court's plan over six weeks ago:

> Granting the State's request would likely come at a cost of substantial harm to the public interest. Potential voters may be confused by the continuing uncertainty in district maps and dates for the primary elections. This, in turn,

> may reduce voter turnout. . . . The State asks the Court to impose these costs, and the significant financial burden of a delayed election, upon the Texas citizenry, even though the State's own actions in preparing an electoral plan have largely produced the situation the State now faces.

Memorandum of the United States as Amicus Curiae in Opposition to Application for Stay Pending Appeal, *Richards v. Terrazas*, ___U.S.___, 112 S.Ct. 924 (1992), at 10 (footnote omitted).

2. The Interim Senate Plan Improves Minority Voting Rights In Comparison To The Quiroz Plan.

Despite its self-professed concern for the voting rights of minorities, the state does not scruple to compare the lower court's interim senate plan with SB1. Moreover. because it declines to acknowledge the existence of the court-ordered benchmark, it is likely to have overlooked its contents. Since the court's interim plan clearly is superior to SB1, the state's failure to compare the plans is understandable. However, while it is not accurate to say that the lower court considered SB1 before issuing its decision, it did consider the *Quiroz* Plan, SB1's illegal predecessor. In its interim plan, the court successfully improved upon the state's proposal.

The lower court's interim plan contains ten districts with a total minority population over 54%, while SB1 contains only nine districts with a total minority population over 46%. More significantly, the court's interim plan

contains nine districts with a minority voting age population ("VAP") in excess of 60%. This improves upon SB1, which contains only eight districts with a minority VAP in excess of 60%. Further, the interim plan contains ten districts with a minority VAP in excess of 48%. SB1, on the other hand, contains only nine districts with a minority VAP in excess of 48%.

Given the interim plan as a benchmark, it is clear that implementation of SB1 would result in a retrogression of minority voting strength. At least one of SB1's so-called minority districts (District 20) has a minority VAP under 60%. In addition, elections under SB1 would deny minority voters in Dallas/Fort Worth the electoral opportunity they have under the court's interim plan, which draws District 12 as a minority impact district with a total minority population of 54.1% and a minority VAP of 48.5%. SB1 has no impact districts: a gap of 18.2% separates the minority VAP of its smallest minority district (District 20 – minority VAP 59.8%) and the next largest district in minority population (District 15 – minority VAP 41.6%). Thus, minority voters have at best a chance of electing eight or nine candidates of their choice under SB1. Under the lower court's plan, it is virtually certain nine minority candidates will be elected, and very possible that ten such candidates will prevail.

Although the issue before this Court is not whether to preclear SB1, the marked distinctions between the plans are important. The state asks this Court to overturn the interim plan, and to order it replaced by SB1 (despite its lack of preclearance). Since the interim plan issued from the lower court's equitable jurisdiction, *see Wise v. Lipscomb*, 437 U.S. at 540; *Mahan v. Howell*, 410 U.S. at 332,

fairness is a legitimate consideration. Both legally and factually, the lower court acted to help those voters ignored by the state's politicking. The state's effort to characterize the issue as one of federal/state relations is a patent attempt to obscure the question of fairness.

CONCLUSION

Neither of the questions raised by the state is substantial. This largely is because the questions rest on premises that are incorrect. The lower court did not act under section 5 to replace a preclared legislative plan. This Court therefore need not consider whether it could have taken such an action. Similarly, this Court need not consider whether preclearence of a legislative plan raises a presumption of validity that bars interim relief. No precleared plan existed, and there thus was nothing from which such a presumption could have arisen. The lower court's judgments therefore should be affirmed.

For the foregoing reasons, Appellees respectfully request that Court summarily affirm the decisions of the district court below.

Respectfully submitted,

JOHN N. MCCAMISH, JR.
Counsel of Record
MCCAMISH, MARTIN & LOEFFLER
A Professional Corporation
175 East Houston,
Suite 1200
Post Office Box 2999
San Antonio, Texas
78299-2999
Telephone: (512) 225-5500

OF COUNSEL:

JONATHAN D. PAUERSTEIN
KEVIN M. WARBURTON
MCCAMISH, MARTIN & LOEFFLER
A Professional Corporation

March 1992

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LOUIS TERRAZAS, et al., Plaintiffs	§	
AND	§	CIVIL ACTION NO. A-91-CA-426
ROBERT A. ESTRADA, et al., Plaintiffs/ Intervenors,	§	(Filed Nov. 27, 1991)
VS.	§	
BOB SLAGLE, et al., Defendants.	§	

APPLICATION FOR PRELIMINARY INJUNCTION, REQUEST FOR IMPLEMENTATION OF INTERIM PLAN, AND REQUEST FOR CONSOLIDATED HEARING

Plaintiffs Louis Terrazas, Ernest Angelo, Jr., and Tom Craddick, and Plaintiff/Intervenors Robert A. Estrada and Sim D. Stokes III, (collectively, "Plaintiffs"), file this application for preliminary injunction against Defendants Ann W. Richards, Dan Morales, and John Hannah, Jr., ("State Defendants"), this request for the implementation of an alternate redistricting plan for the 1992 election for the Texas Senate, and this request for hearing on such matters on December 10, 1991.

I.

Preliminary Statement

Plaintiffs seek three things by this motion: (1) an injunction against the conduct of elections under the illegal senate redistricting plan fashioned by the States Defendants (the "Quiroz Plan"); (2) an order implementing Plaintiffs' senate plan on an interim basis; and (3) an order scheduling hearing of the first two matters on December 10, 1991. As set forth below, an injunction should be issued because the Quiroz Plan was created illegally and also violates the United States Constitution and the Voting Rights Act. To replace the Quiroz Plan on an interim basis, Plaintiffs' redistricting plan should be adopted because it does not suffer from the legal and practical flaws of the Quiroz Plan. Finally, these matters should be heard on December 10, 1991, the date now set for hearing on Plaintiffs' request for interim relief in the action concerning redistricting of the Texas House.

II.

Legal and Factual Background

On November 18, 1991, the United States Attorney General precleared the plan purportedly fashioned by an agreed judgment signed by a state district judge as a replacement for the redistricting plan passed by the Texas Legislature for the Texas Senate ("Quiroz Plan"). While the Attorney General reserved his right to reconsider the preclearance decision until January 14, 1992, no court order or statute now prevents implementation of this illegal plan by the State Defendants.

Nevertheless, the Attorney General's decision was based on the limited criteria his office is required to evaluate under section 5 of the Voting Rights Act. The Justice Department did not, and legally could not, pass upon the serious state law issues raised by Plaintiffs concerning the method by which the Quiroz Plan was forced upon the citizens of Texas. Similarly, the Justice Department did not evaluate – and gave no opinion on – the validity of the "extraordinarily convoluted" districts created by the Quiroz Plan. Moreover, the department did not review this plan in the light of political gerrymandering claims. Far from disposing of the Plaintiffs' claims, preclearance removes a procedural obstacle the State Defendants have used as a defense to consideration of the Plaintiffs' challenges. As the Plaintiffs can prove, the Quiroz Plan dilutes minority voting rights, shuts Republicans out of the political process, and violates rights guaranteed by the Voting Rights Act and the Constitution.

The imminent deadlines for the upcoming senatorial election require that immediate action be taken to stop the violations the Quiroz Plan will cause. Other intervenors already have sought to enjoin the plan, and have requested implementation of the law originally passed by the Texas legislature ("SB 31"). While disagreeing as to the remedy, Plaintiffs concur with these parties regarding the dangers of the Quiroz Plan and the need to prevent its implementation. Plaintiffs therefore ask that Defendants be preliminarily enjoined from conducting elections or taking any steps to conduct elections under the Quiroz Plan.

Plaintiffs also propose interim implementation of their alternate senate plan, which was submitted to this

Court on November 4, 1991, designated as S562. This plan creates an additional minority impact district, alleviating the dilution caused by the Quiroz Plan. In addition, Plaintiffs' plan creates districts having absolute population equality: i.e., the deviation of each of S562's districts from ideal district size is 0%. This is a significant improvement over the 9.99% total deviation resulting from the forced design of the Quiroz Plan. Moreover, S562 creates fewer administrative problems than does the collusive judgment plan, as it cuts across 199 fewer VTD's than were split by the private parties who are attempting to foist their political deal upon Texas. Lastly, the districts created by S562 are more compact and contiguous than those created in an effort to appease political pressure groups. S562 therefore should be adopted on an interim basis as the redistricting plan for the Texas Senate.

Plaintiffs also request that their application and request for interim application be heard on December 10, 1991, the date of the scheduled hearing on their request for interim implementation of their proposed alternate plan for the Texas House.

III.

Application for Preliminary Injunction

A. The Quiroz Plan Should Be Enjoined Because It Violates State Law.

Plaintiffs reurge their arguments in support of their initial request for injunctive relief against the illegally adopted Quiroz Plan, which was filed in October. Plaintiffs again request that this Court stop the State Defendants in their attempt to deprive Plaintiffs – and all Texas

voters – of the right to participate in the redistricting process through their elected representatives. The facts and the law supporting the federal and state claims raised by Plaintiffs were set forth in Plaintiffs' original application for injunction and in their reply to the State Defendants' response thereto, and were presented to the Court in oral argument on October 23, 1991. For the purposes of this application, Plaintiffs incorporate herein by reference the grounds for relief and authorities cited in their injunction application and reply in connection with the injunction hearing conducted by the Court on October 23, 1991.

B. The Quiroz Plan Should Be Enjoined Because It Violates Federal Law.

In addition to the procedural defects of the Quiroz Plan that are the subject of the October injunction request, Plaintiffs assert that the plan substantively violates the Voting Rights Act and the Constitution. Due to these statutory and constitutional violations, Plaintiffs request injunctive relief similar to that sought in their earlier pleadings.

C. Plaintiffs Can Establish The Elements of Injunctive Relief.

The issuance of a preliminary injunction against the implementation of the Quiroz Plan pending trial is necessary for the following reasons: (a) Plaintiffs are likely to succeed on the merits of their claim that the plan violates the Voting Rights Act and the Constitution; (b) unless

stopped, implementation of the Quiroz Plan in the 1992 senatorial election will result in irreparable harm to Plaintiffs and all minority and Republican voters in Texas; (c) the balance of harm favors issuance of an injunction, in that no harm will result to the state if its officers are prohibited from conducting an election under an illegal redistricting plan; and (d) public policy will not be disserved by the prevention of an election that is likely to result in underrepresentation of minority and Republican voters.

Plaintiffs are likely to succeed on their claims that the districts created by the Quiroz Plan violate the protections afforded to racial and language minorities by the Voting Rights Act and the one person/one vote guarantees of the Fourteenth and Fifteenth Amendments of the Constitution. In concocting the Quiroz Plan, the State Defendants intended to discriminate against Republican voters by concentrating their populations into "safe" districts where their votes would be consistently degraded, causing a significant underrepresentation of Republicans in the Texas Senate and resulting in an overall lack of political power. In the case of minorities, these defendants sought to protect incumbents in most areas of the state, resulting in improper fragmentation and concentration of minority populations.

Implementation of the Quiroz Plan would cause irreparable harm to minority and Republican voters. If the 1992 election goes forward under that scheme, the votes of these statewide minorities (which constitute the majority in a number of compact and contiguous areas) would be consistently degraded, and their participation in the political process would be significantly diminished.

No real and legitimate harm can come to the State Defendants if they are enjoined from using the Quiroz Plan in the 1992 senatorial election. These defendants – state officials charged with the responsibility of execution and not the creation of laws – have no recognizable right either to implement their own private plan or to degrade the electoral rights of minority and Republican voters.

Public policy is best served by compliance with the aims of the Voting Rights Act, the United States Constitution, and Texas law. These documents – more than any *ultra vires* bargain struck behind closed doors – reflect the will of the voters regarding the role they are to play in a representative government. Conversely, no public policy supports stripping away the voters' right to participate in the redistricting process through the illegal interference by the state's executive branch. Public policy plainly will not be disserved if the requested injunction issues.

IV.

Request for Implementation of Interim Plan

A. Standards for Implementation.

Because the Quiroz Plan violates the Voting Rights Act, the Constitution, and Texas law, and because the scheduled Senate election is fast approaching, Texas voters need a new, legal plan that establishes the constituencies and residences of their senators. This Court has the equitable power to implement such a redistricting plan on an interim basis. *See Chapman v. Meier*, 420 U.S. 1, 26 (1975).

In adopting an interim plan, this Court has several options. First, it can implement a plan proposed by one of the parties in the action. *Wise v. Lipscomb*, 437 U.S. 535, 542 (1978). In addition, it can adopt portions of proposed plans to create a composite. *Terrazas v. Clements*, 537 F. Supp. 514, 540 (N.D. Tex. 1982). If adopted on an interim basis, a court-ordered plan constitutes an equitable decree, and is not covered by the preclearance requirements of section 5. *McDaniel v. Sanchez*, 452 U.S. 130, 149 (1981).

B. S562 Should Be Adopted.

The reasons for adoption of Plaintiffs' alternate S562 are discussed more fully in the submission of proposals filed on November 4. In short, the reasons for implementation of this plan are three-fold. First, S562 creates an additional district in which the population of minority voters can have a significant impact upon elections: while both the Quiroz Plan and S562 create nine majority (>65%) minority districts, this additional impact (>50%) district increases the likelihood that minorities will be able to elect a representative of their choice. S562 is able to draw this additional minority impact district because it does not sacrifice minority rights for the sake of Anglo incumbents, one of the obvious and intended results of the Quiroz Plan. Second, S562 has a total population deviation of 0%, meaning that each district under the plan contains exactly the same number of residents as every other district. Under the Quiroz Plan, by contrast, the total population deviation is 9.99%, slimly satisfying the letter, if not the spirit, of the 10% benchmark used to

determine whether state legislative redistricting satisfies the one person/one vote requirement of the Constitution. *See Brown v. Thompson*, 462 U.S. 835, 842 (1983). The impact of this difference in population is significant: while all of S562's districts have the same number of residents, the difference between the largest (Dist. 7) and smallest (Dist. 21) districts under the Quiroz Plan is over 54,700 citizens, the largest disparity in Texas since the passage of the Voting Rights Act. Lastly, S562 the cuts across only 129 VTD's, whereas the Quiroz Plan splits 328, indicating that the Plaintiffs' districts are superior in geographical as well as populational compactness.

V.

Request for Consolidated Hearing

Plaintiffs' request for interim implementation of their proposed alternate plan for the Texas House of Representatives has been set for hearing at 9:00 a.m. on December 10, 1991. Many of the legal and evidentiary issues that are raised by this request are relevant in the consideration of the requested injunction and interim plan implementation concerning the Senate election. In the interest of judicial economy, Plaintiffs therefore ask that the foregoing requests be heard on December 10.

VI.

Conclusion and Prayer

If Texas is to conduct a fair and constitutional election for the members of its senate, the Quiroz Plan must be stopped quickly and replaced with a valid substitute.

Because of the state's delays, less than a week remains before the opening of the candidate filing period. It is clear that the current plan sacrifices the rights of minority voters in order to protect Anglo incumbents, and that the state's effort at a plan falls far short of offering minority voters a fair opportunity to elect representatives of their choice. In the case of Republicans, it is even clearer that the State Defendants went out of their way to preserve and even to enhance the disproportionate power their party has in state government. For these reasons, and for the reasons grounded in the due process and equal protection clauses and state law presented in Plaintiffs' earlier request for injunctive relief, the state's further implementation of the Quiroz Plan should be enjoined.

The best available alternate plan before the Court is S562. It is complete and ready for implementation. While other intervenors have suggested that the Court revive the defunct legislative plan, SB 31, Plaintiffs have demonstrated in their specific pleadings filed November 4, 1991, that this plan succumbs to most if not all of the Voting Rights Act and constitutional defects that characterize the Quiroz Plan. Outside of these plans, the only alternative is an entirely new court plan. Given the availability of S562, undertaking that vast project is unnecessary.

WHEREFORE, Plaintiffs request that this Court: (1) enjoin the State Defendants from conducting or preparing for elections under the Quiroz Plan pending trial hereof; (2) adopt S562 on an interim basis and order the state to prepare for and conduct the upcoming elections for the Texas Senate pursuant to this interim plan; and (3) grant

Plaintiffs any and all other relief, legal or equitable, to which they are entitled.

Respectfully submitted,

/s/ John N. McCamish, Jr.
John N. McCamish, Jr.
State Bar Number 13357000
Jonathan David Pauerstein
State Bar Number 15637500
Kevin M. Warburton
State Bar Number 20836600
175 East Houston, Suite 1200
Post Office Box 2999
San Antonio, Texas
78299-2999
Telephone: (512) 225-5500
Fax: (512) 225-1283

OF COUNSEL:

McCAMISH,
MARTIN &
LOEFFLER
A Professional
Corporation

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing instrument has been served by certified mail, return receipt requested, on this 27th day of November, 1991, upon:

Bob Slagle, Esq.
Slagle & Slagle
111 S. Travis Street
Sherman, Texas 75090

Fred Meyer
San Jacinto Tower
Suite 895, LB-5
2121 San Jacinto Street
Dallas, Texas 75201

Renea Hicks, Esq.
Special Assistant
Attorney General
P.O. Box 12548
Capitol Station
Austin, Texas 78711-2548

Charles J. Cooper, Esq.
Shaw, Pittman, Potts &
Trowbridge
2300 N. Street, N.W.
Washington, D.C. 20037

John M. Harmon, Esq.
Graves, Dougherty,
Hearon & Moody
515 Congress Avenue
2300 NCNB Tower
P.O. Box 98
Austin, Texas 78767

Rex D. VanMiddlesworth, Esq.
Mayor, Day, Caldwell &
Keeton, L.L.P.
700 Louisiana, Suite 1900
Houston, Texas 77002

/s/ Jonathan David Pauerstein
by Kevin M. Warburton
Jonathan David Pauerstein

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LOUIS TERRAZAS, et al.,	§	
Plaintiffs	§	
AND	§	
ROBERT A. ESTRADA, et al.,	§	
Plaintiffs/ Intervenors,	§	CIVIL ACTION
	§	NO. A-91-CA-426
VS.	§	
BOB SLAGLE, et al.,	§	
Defendants.	§	

ORDER SETTING HEARING DATE

On this day the Court considered the Plaintiffs request for hearing on their application for preliminary injunction against State Defendants Ann W. Richards, Dan Morales, and John Hannah, Jr. ("State Defendants"), and their request for implementation of interim plan affecting the upcoming election for members of the Texas Senate. After considering said request, the Court issues the following order:

IT IS ORDERED that the Plaintiffs' application for injunction against the State Defendants and their request for interim implementation of their proposed alternate plan for the Senate shall be heard before the three-judge panel in the courtroom of the United States District Court for the Western District of Texas in Austin, Texas, on December 10, 1991, at 9:00 a.m. in conjunction with the hearing on Plaintiffs' request for interim implementation

of their proposed alternate for the Texas House of Representatives.

SIGNED AND ORDERED ENTERED this date: ___.

COPY FOR YOUR INFORMATION
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

APPENDIX B

U.S. Department of Justice

Civil Rights Division

[SEAL]

Office of the Assistant Attorney General
Washington, D.C. 20035

January 4, 1992

John N. McCamish, Jr., Esq.
McCamish, Martin & Loeffler
1200 Republic of Texas Plaza
175 E. Houston
San Antonio, Texas 78299-2999

Dear Mr. McCamish:

I write in response to your letter dated January 3, 1992 regarding the so-called "*Quiroz* Senate plan." Your letter requests that the Attorney General vacate and withdraw the November 18, 1991, preclearance of the *Quiroz* Senate plan for numerous reasons including allegations that it violates the Voting Rights Act. Your letter also indicates that certain members of the Texas Legislature are currently stating in an ongoing debate that passage of a plan similar or identical to the *Quiroz* Senate plan is " 'preapproved' by Justice." You expressed the urgency for an immediate response. Let me respond to both those issues.

First, as you know, the Attorney General specifically reserved the right set forth in Section 5 of the Voting Rights Act and 28 C.F.R. 51.43 to reexamine the submission during the remainder of the 60-day review period. In this case, that period will not expire until January 14,

1992 since the State did not complete its submission until November 15, 1991. *See* 28 C.F.R. 51.39. We are carefully considering all the relevant information presented. In addition, we are cognizant of the decisions of the Texas Supreme Court and the three-judge federal court in *Terrazas v. Slagle*, Nos. 91-CA-425, 426, 428 (W.D. Tex.). Together, those decisions suggest that the *Quiroz* Senate plan submitted to the Attorney General may have been a premature submission not entitled to any determination on the merits. See 28 C.F.R. 51.22, 51.35. In light of the *Terrazas* court's order and the special session of the Texas Legislature, however, it does not appear that Texas intends, or has the legal ability, to implement the *Quiroz* Senate plan. We will continue to monitor developments and take such action regarding the *Quiroz* Senate plan as the Attorney General determines is appropriate.

Second, I am most concerned about the suggestion that any plan has been "preapproved" by the Attorney General. There is simply no such thing as a "preapproved plan." Any plan enacted by the Texas Legislature requires submission under Section 5 of the Voting Rights Act. Review will then take place based upon all information available to the Attorney General at that time. Clearly, there have been significant new developments and submission of new information regarding the *Quiroz* Senate plan since our letter of November 18, 1991. All of that would have to be considered even if the Legislature passed a plan identical to the *Quiroz* Senate plan. Review of any plan hereafter passed by the Legislature, even the *Quiroz* Senate plan, would be a *de novo* review at that time. The fact that we interposed no objection to the *Quiroz* Senate plan in an earlier context would have no

legal relevance to our review of a later enactment, even of a plan containing the same districts.

In addition, analysis of any plan passed by the Special Session of the Texas Legislature requires comparison of that plan to the plan ordered into effect by the *Terrazas* court. In particular, we would have to identify whether any portions of the enacted plan failed to provide minority voters with the same opportunity to elect candidates of their choice that they have under the court-ordered plan and, if so, the reason(s) for altering or rejecting those portions of the court-ordered plan. In addition, we would have to determine whether the court-ordered plan is the appropriate benchmark for consideration of any subsequently enacted plan. See 28 C.F.R. 51.54(b). If so, our conclusion of whether the enacted plan has a discriminatory effect for purposes of Section 5 of the Voting Rights Act, *see* 28 C.F.R. 51.54(a), might well be different than that reached on an identical plan judged against a different benchmark.

Thank you for bringing these matters to my attention. You can be sure that the Attorney General will continue to monitor this situation and take such action as is deemed appropriate.

Sincerely,

/s/ John R. Dunne
Assistant Attorney General
Civil Rights Division

cc: Hon. John Hannah, Jr.
Secretary of State

Hon. Dan Morales
Attorney General

Mr. Bob Kelly
Executive Director,
Legislative Council

Hon. Bob Bullock
Lt. Governor

Hon. Gib Lewis
Speaker of the House

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS v. UNITED STATES OF AMERICA	Civil Action No. 91-2383 (PMW, U.S.C.A., JHG, SS) (Filed Feb. 25, 1992)

MEMORANDUM ORDER

On February 5, 1992, plaintiff filed its Motion for Partial Summary Judgment (and for Oral Hearing and Expedited Consideration) with Supporting Legal Memorandum. On February 6, 1992, the court ordered defendant to submit a memorandum in response to plaintiff's motion. Defendant filed its Memorandum in Opposition to State of Texas' Motion for Partial Summary Judgment on February 13, 1992. Plaintiff filed a memorandum in reply on February 19, 1992.

Oral argument on plaintiff's motion was held on February 21, 1992 before the district court comprised of three judges in accordance with 28 U.S.C. § 2284 and 42 U.S.C. § 1973c. At the conclusion of oral argument, the matter was deemed submitted.

I. BACKGROUND

On September 20, 1991, the State of Texas filed its complaint seeking relief under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1988) ("section 5").

Specifically, the State sought preclearance of its redistricting plans that had been passed by the legislature during the summer of 1991. Although four plans – governing elections to the Texas House, Texas Senate, Texas Board of Education, and United States Congress – were originally the subject of this suit for declaratory judgment under section 5, only one of these – the Texas Senate plan – remains at issue.

Prior to the filing of this suit in September 1991, the State submitted its original Texas Senate plan – S.B. 31 – to the Attorney General of the United States under the alternative preclearance procedures provided under section 5. According to the statute, the Attorney General had 60 days to object to any part of the proposed plan; if no objection were filed after 60 days, the plan would be precleared and the State would be free to begin implementing it. On the 59th day – October 7, 1991 – the State notified the Attorney General that it was withdrawing S.B. 31 from consideration and submitting a different plan in its place.

The new plan submitted on October 8, 1991 was the result of a settlement signed the previous day between the Texas Attorney General and private plaintiffs in a state court proceeding challenging the S.B. 31 plan. *Quiroz v. Richards*, C.A. No. C-4395-91-F (332d Jud. Dist., Hidalgo County). This same settlement was entered three days later in a parallel state court action. *Mena v. Richards*, C.A. No. C-454-91-F (332d Jud. Dist., Hidalgo County). The so-called "*Quiroz/Mena* settlement plan" governing elections to the Texas Senate was precleared by the Attorney General on November 18, 1991.

On December 17, 1991, the settlement reached in both *Quiroz* and *Mena* was invalidated by the Texas Supreme Court on the grounds that the trial judge abused his discretion in accepting the settlement without first conducting an adversary proceeding. The State thereafter refrained from further implementation of the *Quiroz/Mena* settlement plan.

On December 24, 1991, a three-judge federal court in the Western District of Texas – which had been convened to consider various constitutional and statutory challenges to the plans passed by the Texas legislature in the summer of 1991 – entered judgment "to provide for a valid and equitable interim state legislative redistricting plan in the current circumstances in which no valid plan exists under federal law." *Terrazas v. Slagle*, Civil Nos. A-91-CA-425, -426, -428, Summary Opinion and Judgment at 23 (W.D. Tex. Dec. 24, 1991). The court ordered primary elections for the Texas Senate to be conducted pursuant to its own interim plan which it attached as an appendix to its ruling. This is the so-called *Terrazas* plan.

Meanwhile, the Governor called the Texas legislature into special session to cure the procedural deficiencies of the *Quiroz/Mena* settlement plan by means of legislative enactment. On January 8, 1992, the legislature adopted a new senate plan ("S.B. 1"), and the Governor signed it into law. it is undisputed that S.B. 1 is substantively identical to the *Quiroz/Mena* settlement plan that the Attorney General had precleared in November 1991.

On January 9, 1992, the State filed a motion in the *Terrazas* court to vacate the December 24, 1991 order and

to order, instead, the implementation of the newly ratified S.B. 1. On January 10, the court denied the motion, finding that S.B. 1 "fail[ed] to satisfy the Sec. 2 requirements of the Voting Rights Act." *Terrazas v. Slagle*, Civil Nos. A-91-CA-425, -426, Order and Judgment at 12-13 (W.D. Tex. Jan. 10, 1992). The state sought a stay of the December 24, 1991 order pending appeal, but the Supreme Court denied the stay on January 16, 1992. *See Richards v. Terrazas*, 112 S. Ct. 924 (1992). The state has appealed both the December 24, 1991 and the January 10, 1991 orders to the Supreme Court, *Richards v. Terrazas*, 60 U.S.L.W. 3554 (U.S. Feb. 18, 1991), and the case is currently pending. *See Id.* at 3560 (questions presented).

On January 10, 1992, the State submitted S.B. 1 to the Attorney General for precleraance under section 5. The Attorney General's deadline for objecting to the proposed plan in March 9, 1992. Under the *Terrazas* plan, the primary election for the Texas Senate is scheduled for March 10, 1992. The candidate qualification period was closed on January 10, 1992, and the "early voting" procedure commenced on February 19, 1992.

II. DISCUSSION

Under section 5 of the Voting Rights Act, no person may be deprived of a right to vote for failing to comply with a new enactment affecting voting procedure unless the new enactment has been precleared. The jurisdiction covered by the Voting Rights Act has two options: It may submit the proposed procedure to the Attorney General, who may prevent preclearance only by objecting to the proposal within 60 days, or it may seek a declaratory

judgment in the U.S. District Court for the District of Columbia that the new enactment "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (1988).

Plaintiff's burden in a suit for declaratory judgment under section 5 is twofold: First, it must demonstrate that the redistricting plan does not lead to a retrogression in the position of racial minorities, *see Beer v. United States*, 425 U.S. 130, 141 (1976); second, the State must demonstrate that the plan is free of a discriminatory purpose. *Richmond v. United States*, 422 U.S. 358, 362 (1975); *Busbee v. Smith*, 549 F. Supp. 494, 516 (D.D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1983). Even if a change is "ameliorative," it may violate section 5 if it "so discriminates on the basis of race or color as to violate the Constitution." *Beer*, 425 U.S. at 141.

In its motion for partial summary judgment, the State makes three arguments: First, it argues that there is no longer a live controversy between the parties because S.B. 1 has already been precleared (in the guise of the *Quiroz/Mena* settlement plan), so there is nothing for this court to do but to declare that the plan is already precleared. Second, the State argues alternatively that this court should exercise its authority under section 5 and preclear S.B. 1 because, as a matter of law, it cannot be retrogressive when compared to the benchmark plan – the *Quiroz/Mena* settlement plan – to which it is identical. Finally, the State argues that S.B. 1 is not subject to preclearance because it is not a change in voting procedures, for the only difference between it and the earlier precleared

Quiroz/Mena settlement plan is in the manner in which the State adopted the plan.

A. Has S.B. 1 Already Been Precleared?

The Attorney General precleared the *Quiroz/Mena* settlement plan in November 1991. Section 5 is concerned about *changes* in voting procedures that have the purpose or effect of diluting or abridging the right to vote on account of race. *Beer v. United States*, 425 U.S. 130, 141 (1976). The fact that the Attorney General implicitly concluded in November 1991 (by not objecting to the proposal) that the *Quiroz/Mena* settlement plan was not a change in voting procedures that diluted or abridged minority voting rights tells us only that, when compared with the existing plan in place in November 1991, the *Quiroz/Mena* settlement plan was not considered to be retrogressive. But whether S.B. 1 is retrogressive as of the moment it was submitted to the Attorney General on January 10, 1992 is a different question.

Preclearance involves a comparative inquiry into whether the change in voting procedures is retrogressive when compared with the plan that would otherwise be in force and effect. *See Perkins v. Matthews*, 400 U.S. 379, 394 (1971); *see also City of Lochart v. United States*, 460 U.S. 125, 132-33 (1983) (proper comparison is between new system and system actually in effect prior to adoption of new charter, regardless of what state law might have required). In this case, the plan in effect since December 24, 1991 has been the interim court-ordered *Terrazas* plan. When preclearing the *Quiroz/Mena* settlement plan in November 1991, the Attorney General did not compare it

with the *Terrazas* plan, which did not yet exist, but rather to the plan otherwise in effect, which was the plan governing elections to the Texas Senate prior to the 1990 census. The retrogression inquiry may be different in light of the intervening imposition of the *Terrazas* plan. We are thus unable to agree with the State that S.B. 1 has already been precleared.[1]

B. Can S.B. 1 Be Precleared as a Matter of Law?

If we were to determine that the benchmark against which S.B. 1 is to be compared is the *Quiroz/Mena* settlement plan, then the fact that the two plans are identical would compel us to conclude, as a matter of law, that S.B. 1 is not retrogressive under *Beer*. But that would not be the end of the preclearance inquiry. This court would have to inquire into the second test under section 5 – whether a racially discriminatory purpose was among the factors that motivated the State in devising S.B. 1. In order for this court to preclear S.B. 1 under section 5, we would have to engage in an independent inquiry into its constitutionality. The purposes motivating the *Quiroz/*

---

[1] We are not unmindful of the considerable controversy surrounding the adoption of the *Terrazas* plan. *See, e.g.*, Roberto Suro, *Texas Remapping Battle Heats Up, Threatening to Singe the Democrats*, N.Y. TIMES, Jan. 26, 1992, at 14; Sam Attlesey, *Morales Investigates Call Between Lawmaker, Judge*, DALLAS MORNING NEWS, Feb. 1, 1992, at 1A. Nevertheless, issues concerning how or why the *Terrazas* plan was adopted must be separated from the substantive merits of the plan itself. In order for S.B. 1 to be precleared, it must not have the effect of abridging minority voting rights when compared to the *Terrazas* plan.

Mena settlement plan are different from those motivating S.B. 1. Any determination of whether S.B. 1 has a discriminatory purpose would require us to conduct some kind of hearing. In any event, it is not an issue that can be resolved on summary judgment.[2]

The Department of Justice argues that the *Terrazas* plan must be deemed the proper benchmark plan for section 5 preclearance purposes. Unless and until it is held to be unconstitutional or otherwise invalid under section 2 of the Voting Rights Act, it is, in fact, the only plan in effect. It would appear that, at the very least, this court must conduct an evidentiary hearing to determine whether S.B. 1 is retrogressive with respect to the *Terrazas* plan. "A section 5 declaratory judgment should be denied when the electoral plan under review is retrogressive in comparison to a court-ordered plan that will be implemented absent approval of the statutory plan." *Mississippi v. Smith*, 541 F. Supp. 1329, 1333 (D.D.C. 1982), *appeal dismissed*, 461 U.S. 912 (1983). Inasmuch as a hearing is

---

[2] At oral argument on February 21, 1992, counsel from the Department of Justice represented to the court that the Attorney General would most likely interpose an objection to S.B. 1 on the grounds that the *Terrazas* court had found it to be violative of section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1988). *See* Transcript of Motion for Partial Summary Judgment (filed Feb. 24, 1992) at 37-38. We therefore have no expectation that S.B. 1 will be precleared as of March 10, 1992, and we anticipate the need for a full evidentiary hearing. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 549 (1969) ("If the Attorney General objects to the new enactment, the State may still enforce the legislation upon securing a declaratory judgment in the District Court for the District of Columbia.").

required, plaintiff cannot now prevail on summary judgment.

Court-ordered plans are generally *not* subject to section 5 preclearance, *see Connor v. Johnson*, 402 U.S. 690, 691 (1971) (per curiam). The only court-ordered plans that *are* subject to preclearance are those that reflect the policy choices of the covered jurisdiction. *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981); *Wise v. Lipscomb*, 437 U.S. 535, 548 (1978) (Powell, J., concurring). The record clearly indicates that the court-ordered *Terrazas* plan does *not* represent the policy choices of the State of Texas, so it cannot reasonably be interpreted to be a change in voting procedure submitted by the State. Section 5 does not, therefore, prevent the implementation of the *Terrazas* plan. The fact that the *Terrazas* plan is legally enforceable without section 5 preclearance and that it has, in fact, already been implemented, means that – at least until it is vacated – it is, the only benchmark we have against which to compare any proposed change in voting procedures.[3]

---

[3] The Supreme Court has recognized that, although not binding on this court, the Department of Justice's construction of the Voting Rights Act is entitled to considerable deference. *See Presley v. Etowah County Comm'n*, No. 90-711, slip op. at 16 (U.S. Jan. 27, 1992). According to Justice Department regulations, court-ordered plans are subject to preclearance by the Attorney General under section 5 "to the extent that they reflect the policy choices of the submitting authority." 28 C.F.R. § 51.18(a) (1991). If a court-ordered plan for which preclearance under section 5 is necessary (that is, a plan that reflects the policy choices of the submitting authority) has not, in fact, been precleared as required, it cannot serve as a

(Continued on following page)

C. Is S.B. 1 Subject to Preclearance?

While it is true that the principal difference between S.B. 1 and the *Quiroz/Mena* settlement plan is in the procedural mechanism by which they were "enacted" by the State, that is not the only difference between the two plans. They were enacted and submitted for preclearance in different contexts. There is apparently no dispute that S.B. 1 and the *Terrazas* plan differ such that, if the *Terrazas* plan is the benchmark, S.B. 1 represents a change in voting procedure. For this reason, S.B. 1 would be subject to preclearance under section 5.

But even if the *Quiroz/Mena* settlement plan were deemed to be the proper benchmark, S.B. 1 would still be subject to preclearance. While the retrogression analysis would be simple inasmuch as S.B. 1 and the *Quiroz/Mena* settlement plan are substantively identical, the analysis of whether S.B. 1's purpose was discriminatory cannot be resolved simply by recognizing that the *Quiroz/Mena* settlement plan had been precleared. At the very least, S.B. 1 and the *Quiroz/Mena* settlement plan differ in the way they were enacted. We cannot conclude, as a matter of law, that the purposes behind S.B. 1 – passed by the legislature after the December 24, 1991 order in *Terrazas* – were nondiscriminatory simply because the Attorney

---

(Continued from previous page)

benchmark for subsequent changes submitted by the jurisdiction. *Id.* § 51.54(b)(3). Nothing in the regulations precludes the use of a court-ordered plan that is not subject to preclearance under section 5 – such as the *Terrazas* plan – as a benchmark for subsequent changes in voting procedures.

General determined that the purposes behind the *Quiroz/ Mena* settlement plan were not discriminatory. We could make that conclusion only after an evidentiary hearing.

III. CONCLUSION

For the reasons discussed above, we cannot conclude that S.B. 1 has already been precleared or that S.B. 1 may be precleared as a matter of law or that S.B. 1 need not be precleared because it is not a change in voting procedures.

Accordingly, it is this 25th day of February, 1992,

ORDERED that Plaintiff's motion for partial summary judgment be, and hereby is, DENIED; and it is

FURTHER ORDERED that a status call to consider a schedule for any further proceedings in the case shall take place on *Wednesday, March 18, 1992 at 4:00 pm* in Courtroom No. 17 at the United States Courthouse, Washington, DC 20002.

/s/ Patricia M. Wald
Patricia M. Wald
United States
Circuit Judge

/s/ Joyce Hens Green
Joyce Hens Green
United States
District Judge

/s/ Stanley Sporkin
Stanley Sporkin
United States
District Judge